United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE

United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1938.

No. ~~6254~~ 7254

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA
FILED JAN 14 1939
Joseph W. Stewart
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WADE H. COOPER,
Appellant,

vs.

J. F. T. O'CONNOR, individually and as Comptroller of the Currency of the United States, F. G. AWALT, individually and as Former Acting Comptroller and Former Deputy Comptroller of the Currency of the United States, and GEORGE P. BARSE, individually and as counsel for the Insolvent Division of National Banks and general counsel for the Comptroller of the Currency of the United States,
Appellees.

BRIEF FOR APPELLANT.

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THE REPORTER COMPANY, Inc., Walton, N. Y.
1939

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA,

October Term 1938.

7254
No. ~~6254~~

WADE H. COOPER,
Appellant,
vs.
J. F. T. O'CONNOR, individually and as Comptroller of the Currency of the United States, F. G. AWALT, individually and as Former Acting Comptroller and Former Deputy Comptroller of the Currency of the United States, and GEORGE P. BARSE, individually and as counsel for the Insolvent Division of National Banks and general counsel for the Comptroller of the Currency of the United States,
Appellees.

Appeal From the District Court of the United States for the District of Columbia.

BRIEF OF APPELLANT.

Statement of the Case.

This is an appeal from a decree of the lower Court sustaining a motion of the defendants, J. F. T. O'Connor, F. G. Awalt and George P. Barse, appellees herein, to dismiss the bill of complaint filed herein.

The action was filed by appellant, Wade H. Cooper, for himself and all other depositors, creditors and stockholders of the Commercial National Bank of Washington, D. C., in liquidation (R. 2), for a complete discovery and accounting from the appellees of the moneys of said Commercial National Bank of Washington, D. C., wrongfully, illegally and unlawfully paid out by them (R. 7).

Briefly stated, it is alleged in the bill of complaint that the appellees paid in cash from funds of said Commercial National Bank or caused to be paid by the sale of bonds the full deposit accounts of the Inland Waterways Corporation, the United States Shipping Board, Merchant Fleet Corporation, Government of Canal Zone, Treasurer of Philippine Islands and the Alien Property Custodian, which payments were illegal, unlawful and in fraud of the other depositors and creditors of the said Commercial National Bank as such payments created a preference in their favor to the detriment or loss of all the other depositors and creditors of said bank (R. 3, 4). The bill further alleges that they paid the sum of $12,000 to one Thomas E. Rhodes of the depositors' money of the Commercial National Bank because said Rhodes, a depositor, instituted a suit to recover all of the aforesaid sums unlawfully paid out by said appellees and upon the Supreme Court of the United States sustaining this Court in the right of said Rhodes to maintain his suit, these appellees entered into a scheme or plan by which the suit of Rhodes would be merged or consolidated with a belated suit instituted by the said appellee, J. F. T. O'Connor, or his duly authorized agent, the Receiver of said Commercial National Bank, and $12,000 of the depositors' money of said Commercial National Bank was paid to said Rhodes in consideration of said agreement when said sum, if paid by anyone, should have been paid out of appellees own funds (R. 5, 6).

Allegations of Fraud.

It is alleged that the appellees were Trustees for all of the depositors, creditors and stockholders of said bank and as such were acting in a fiduciary capacity, that they were charged with knowledge of the law and of their duties and obligations as Trustees and that in giving said preferences to the named depositors they have violated the law and their obligations as Trustees and their acts were illegal, unlawful and in fraud of all the other depositors and creditors of said Bank and that the agreement for the staying or abandoning of the Rhodes suit was illegal and unlawful, ultra vires and void insofar as it relates to appellant and any and all other depositors, creditors and stockholders of said Commercial National Bank. The paying of the $12,000 out of the funds of the Commercial National Bank was a fraud on the depositors, creditors and stockholders as, if paid by anyone, it should have been paid by appellees out of their own funds and not out of the funds of said Bank.

Appearance by Appellees.

Appellees filed an answer taking issue with the allegations of the bill of complaint (R. 8-23) and in addition to the denials and allegations therein, a motion to dismiss the bill of complaint was interposed (R. 27 to 29). Subsequently, the appellee, Awalt, with the approval of the Court (R. 34) filed an amendment to his answer (R. 29). Robert C. Baldwin was sued as former Receiver of the said Commercial National Bank of Washington, D. C., as well as in his individual capacity (R. 3) but service was not obtained and no appearance was entered in his behalf.

The motion to dismiss challenged the sufficiency of the bill of complaint; challenged any attack upon acts of administrative and executive officers of the United States; challenged liability because pledges of assets were made by bank; challenged personal liability of government officers for mistakes of law; challenged liability on $12,000 payment claiming approval by court; claimed laches; and lack of demand upon the bank to bring this suit (R. 29, 30).

Error Relied Upon.

It is insisted for appellant that the lower Court erred in sustaining motion of appellees to consider the points of law raised in the answer to the bill of complaint and dismissing the bill.

Outline of Points Involved.

(a) That appellant is a stockholder in the banking institution named and sues in his own behalf and in behalf of others (R. 2).

(b) That appellee, J. F. T. O'Connor, is sued in his individual capacity as well as Comptroller of the Currency (R. 2); that appellee, Awalt, is sued in his individual capacity as well as former Acting Comptroller and former Deputy Comptroller of the Currency of the United States (R. 2), that appellee, George P. Barse is sued in his individual capacity as well as counsel for the Insolvent Division of National Banks and as General Counsel for the Comptroller of the Currency of the United States (R. 3).

(c) That on February 27, 1933, the Commercial National Bank of Washington, D. C., was placed in the hands of a Receiver by appellee Awalt, acting Comptroller of the Currency of the United States and all assets were delivered to said Receiver (R. 3).

(d) That said bank had the following deposit accounts at the date the Receiver was appointed:

Inland Waterways Corporation, a corporation, approximately	$482,656.58
The United States Shipping Board, Merchant Fleet Corporation, a corporation, approximately	409,297.28
Government of Canal Zone, approximately	711,622.92
Treasurer of Philippine Islands, approximately	1,003,602.74
Alien Property Custodian, approximately	162,298.93 (R. 3, 4);

and that certain bonds of sufficient value to protect the monies deposited had been delivered to the above-named depositors as collateral to secure payment of said deposits but appellant is unable to furnish an exact list of the bonds according to the records of the bank as he is denied access to said records (R. 4).

(e) That the defendants, including appellees, either paid said depositors in full for their deposits or authorized them to make sale of said bonds or delivery of title to them for said payment (R. 4); that the payment of these deposits, in full, was illegal, unlawful and in fraud of the other depositors and creditors of the said bank, as well as creating a preference to the detriment or loss of the other depositors and creditors (R. 4); that said monies unlawfully and illegally paid out were with the knowledge, consent and approval of the defendants, including appellees (R. 4, 5).

(f) That the defendants, including appellees, were acting as trustees and representatives of both appellant, and other stockholders, depositors and creditors of said bank; that they were acting in a fiduciary capacity; and that as such trustees and representatives they were charged with knowledge of the law and their duties and obligations as trustees; and that in giving preference or priority to said depositors or creditors, they violated the law and their obligations as trustees to all the other depositors, creditors and stockholders of said bank and that their acts were illegal, unlawful and in fraud of all the other depositors and creditors (R. 5).

(g) That the appellees entered into a scheme or plan by which the suit of one, Thomas E. Rhodes, a depositor, to recover all of said sums so unlawfully paid would be merged or consolidated with a belated suit instituted by the appellee, O'Connor, or his agent, for the recovery of said monies and that $12,000 of the innocent depositors' money of said bank, should be paid to said Rhodes in furtherance of said scheme and that as a result said suit was consolidated or stayed and abandoned and $12,000 of depositors' money of said Bank belonging to the depositors and creditors was paid to said Rhodes.

(h) That the agreement for the staying or abandoning of said suit by said Rhodes was illegal, unlawful, ultra vires and void insofar as it relates to this appellant and other stockholders, depositors and creditors of said bank, as said $12,000 was only caused to be paid out because of the unlawful payment by appellees of said deposits and their negligence in seeking to recover said monies as they were in duty bound to do (R. 6).

(i) That the depositors and creditors of said bank have been deprived of the use of their money long enough as a result of the illegal and unlawful payment and that the monies should have been restored by appellees or their sureties long ago (R. 6).

(j) That appellant did not learn of the payments for a long time thereafter as he was denied access to the books and records of said bank and for said reason is unable to give the exact amounts and exact dates of the sales from the records of the bank (R. 6).

(k) That the stockholders or depositors and creditors have sustained a net loss of approximately One Million Dollars and that said bonds were negligently allowed to be sold by the appellees at a sacrifice and loss when it was the duty of all the appellees to conserve, save and protect the rights of the depositors, creditors and stockholders of said bank (R. 7).

(l) That discovery be had of the appellees showing the exact amount paid to each of the depositors or the exact amount derived from the sale of said bonds and the exact amount credited upon the account of each depositor as a result of the sale of said bonds and the dates of same, including the date of the sale of said bonds and requiring discovery of a complete list of the bonds, name and amount that were held by each depositor as well as the price realized from the sale (R. 7, 8).

(m) That accounting be had of the appellees for the difference between what has been paid out on said sums unlawfully paid out and what has been collected or property credited less a credit of 60% leaving a balance due of approximately $1,000,000 and a loss on account of sale of bonds of about $1,000,000 or a total of about $2,000,000 (R. 7).

Comptroller and Agents Are Trustees.

That all of appellees as well as the receiver of the said bank were trustees and were acting in a fiduciary capacity in holding, managing, and disposing of the cash, bonds and other assets of said institution, may be accepted as a proposition that may not be denied. It would seem that a bare statement of the proposition, coupled with the acts of these officials in making payment of these deposits, would raise the clear obligation to act fairly and impartially among all the depositors and not give any depositor a preference to which he is not legally entitled. With the institution in receivership, the Comptroller and his employees, agents, and subordinates, including the Acting Comptroller and Deputy Comptroller and the Counsel for the Insolvent Division of National Banks and General Counsel for the Comptroller, substituted for the real owners of the property, it would follow that in whatever transactions they might engage they would, as substitutes and Trustees for the owners, fully protect their rights. And this obligation would be no less exacting, and no less fixed and continuous, where the trustees, happen to be officials, rather than private individuals. They were, as officials, given no *carte blanche* authority, free from restraints of equity and good conscience, in their relation to these assets and its real owners; as in fact, their official positions should forever be a guarantee and assurance, in all circumstances, that the rights of all creditors and depositors would be fully preserved. And it would seem that no claim of immunity on account of official position should prevail.

Fraud.

The appellees, who were Trustees, paid in full the deposits of the several corporations and accounts named although said depositors were not entitled to receive any priority or preference nor to receive any payment until the other depositors received a payment and then only on a pro rata basis with the other depositors. These payments were illegal, unlawful and in fraud of the other depositors, creditors and stockholders of the said Commercial National Bank. These payments were made in secret, said appellees, their employees and agents, denying appellant access to the books and records of said bank thereby preventing appellant from learning of the said unlawful payments of said sums of money for a long period of time (R. 6).

Further evidence of fraud is the unlawful and illegal action in paying out $12,000, of the innocent depositors' money belonging to the creditors and depositors, to one Rhodes, under the scheme or plan by which the suit of Rhodes which had been instituted on behalf of all depositors and creditors of said bank would be merged or consolidated with a belated suit instituted by the said appellee or his duly authorized agent (R. 5).

Webster's New International Dictionary says:

> "In equity the term fraud * * * includes all acts, omissions, or concealments by which one person obtains an advantage against conscience over another, or which equity or public policy forbids as being to another's prejudice, as acts in violation of relations of trust and confidence."

Bouvier's Law Dictionary says as follows in Volume 1, page 844:

> "What constitutes a case of fraud in the view of courts of equity, it would be difficult to specify. It is, indeed, a part of the equity doctrine of fraud not to define it, not to lay down any rule as to the nature of it, lest the craft of men should find ways of committing fraud which might escape the limits of such rule or definition. * * * It includes all acts, omissions, or concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another."

As showing that the Comptroller of the Currency, even in his official capacity, is not clothed with unlimited discretion and authority in his official acts, and that his official conduct is subject to review, this Court, in *Hamilton v. Offutt*, 64 D. C. App., page 389, has said:

> "While it is, of course, fundamental that the construction by the Comptroller of the law in question, even over a long period of years, is not determinative nor binding on the courts, where, as here, the law is at best doubtful and uncertain, resort may always be had to the practices of the executive departments. Here there is both executive and legislative construction against the asserted power.
>
> "In view of this and what we have already said, it is hardly necessary to add that we are unable to find in D. C. Code 1929, T. 5, 298, any words creating the liability claimed, or to find by necessary implication that the section plainly and convincingly adopts the national banking law of double liability. To the contrary, we think it does not, and consequently we hold that the law of Virginia by which this bank was created governs in measuring the liability of appellees as stockholders."

In the case of *O'Connor v. Rhodes,* 65 D. C. App. 21, this Court said:

> "(1) The amended bill alleges that the sum on deposit to the credit of the Comptroller was withdrawn from the bank and paid to the Comptroller by the receiver, at the Comptroller's direction, and that the money to the credit of the Fleet Corporation and the Alien Property Custodian was withdrawn and paid over by the Receiver, likewise at the direction and by authority of the Comptroller. These allegations, together with a number of others of like import—for instance, that the respective claims for payment in full were filed 'upon the solicitation and request of' the receiver who, in each case, acted on the direction and authority of the Comptroller—abundantly show that the Comptroller and the receiver were both actively and personally involved in the transactions claimed to be unlawful. This, as we think, is enough to take the case out of the ordinary rule" (p. 23).

And in this last mentioned case, in speaking of the relations of the receiver and the Comptroller to the bank and its stockholders and creditors, the Court said:

> "Undoubtedly it is the right and duty of the receiver, as appellants claim, to decide when it is necessary to institute proceedings against debtors of the bank, and the receiver in this respect is the instrument of the Comptroller and wholly under his control (*Kennedy v. Gibson,* 8 Wall. 498, 19 L. Ed. 476). The receiver, in applying the machinery of liquidation, becomes to all intents and purposes the bank—at least he stands in the place of the bank; and while the suspension of the bank does not work a dissolution of the corporation (*Bank of Bethel v. Pahquioque Bank,* 14 Wall. 383, 20 L. ed. 840), the receiver, after his appointment, represents the bank, its stockholders and creditors" (p. 23).

It would follow that the Comptroller of the Currency, when acting in his official capacity, and in connection with the receiver of any bank, is subject to all legal and equitable requirements for just and proper handling of the affairs and assets of such bank, and is accountable to the depositors, creditors and stockholders of such bank. And this must needs be the case. When the management of a bank, for any reason, is taken out of the hands of the officials and directors who normally conduct its affairs, and is placed in the hands of receivers and public officials, and the assets and effects of the bank placed in their charge, and all voice as to the handling of its affairs and assets reposed in such receivers and officials, it would be a strange situation indeed if such receivers and officials should not be held subject to account, at some time, and under some circumstances, for their stewardship in such relation.

Suppose there should be, in a given case, such conduct, and such handling of the assets, as would amount to outright embezzlement or conversion of property; or such use of the property as to result in waste; or such neglect and lack of proper care as to result in loss or destruction of the property, or, as alleged herein, such conduct and handling of the assets as to import fraud—could it be seriously and successfully contended that the parties guilty of any such conduct should not be held accountable to the real owners for any resulting losses.

In 26 Corpus Juris, page 1076, in speaking of the duty of parties acting in relations of trust and confidence, this eminent authority says:

> "(18) ee. Relation of Parties. Where a relation of trust and confidence obtains between the parties, there is a duty to disclose all material

> facts, and failure to do so constitutes fraud. No general rule can be formulated by which the existence of a relation of trust and confidence can be known."

It will be noted that a plea of laches has been interposed by appellee in connection with his motion to dismiss. An examination of authorities in this and other jurisdictions discloses an almost unbroken line of decisions to the effect that where fraud is charged the party guilty of the fraud cannot be heard to interpose a plea of laches or of limitations. Certainly such plea of limitation could not be interposed against a party who had not discovered the fraud prior to the period of limitation.

This view is supported by the case of *Metzger v. Millegan*, 48 D. C. App. 159:

> "Plaintiff established by evidence to the satisfaction of the trial justice and to our satisfaction that she was misled into signing the papers by the false statements of plaintiff, and that she did not discover the nature of the instruments she had executed until shortly prior to the bringing of the present suit. It is unnecessary to consider the effect of the Statute of Limitations upon a suit in equity where the action is based wholly upon fraud, since the fraud was not here discovered until less than three years prior to the bringing of this action, so that, in any event, it is well within the statutory period."

In the case of *Chiswell v. Johnston*, 55 D. C. App. 8, this Court quoted from the case of *Prevost v. Gratz*, 6 Wheat. 481 (5 L. ed. 311), as follows:

> "It is certainly true that length of time if no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of time ought not, upon principles of eternal jus-

> tice, to be admitted to repel relief. On the contrary, it would seem that the length of time during which the fraud has been successfully concealed and practised is rather an aggravation of the offense, and calls more loudly upon a court of equity, to grant ample and decisive relief."

In the case of *Pryor v. McIntire,* 7 D. C. App. 417, the Court said, quoting from page 432:

> "In the noted case of *Michoud v. Girod,* 4 How. 503, 560, where an executor's sale was set aside for constructive fraud after the lapse of more than twenty-seven years, Mr. Justice Wayne, speaking for the court, said: 'In a case of actual fraud, courts of equity give relief after a long lapse of time, much longer than has passed since the executors, in this instance, purchased their testator's estate. In general, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved, length of time out not to exclude relief.' "

In the last mentioned case, on appeal to the Supreme Court, 173 U. S. 38 (43 L. ed. 606), the Supreme Court said:

> "Granting all that mav be fairly claimed of these cases, there is another class having a different bearing, in which it has been held that in case of actual fraud a delay even greater than that permitted by the statute of limitations is not fatal to the plaintiff's claim. The leading case is that of *Michoud v. Girod,* 4 How. 503 (11:1076), which was a case of actual fraud committed by trustees of real estate against their *cestui que* trust. A bill filed thirty-six years after the commission of the fraud was held not to have been too late. In that case a purchase by an executor through a third person, of property of the testator, was held to be fraudulent and void, though the sale was at public auction, judicially ordered, and the re-

> sult of the evidence was that a fair price was paid."

By the motions to dismiss appellees admit the truth of the serious charges of appellant, but seek to avoid responsibility as Government officials, but this they cannot do, because Courts of Equity hold Trustees to strict accountability for the faithful discharge of their duties.

In the case of *Atkins v. Withers,* 94 N. C. 581, the Court said, page 589:

> "It is well marked distinction in transactions between persons standing in fiduciary relations to each other and those between persons who do not bear such relations. In the one case, the law presumes fraud, and the Court pronounces the transaction void, as a legal question, unless the presumption is rebutted."

Again in *Edgerton v. Logan,* 81 N. C. 172, 176, the Court said:

> "The facts disclosed in the pleading independently of the finding by the jury, show a case of fraud."

And in the case of *Anthony v. Jeffress,* 172 N. C. 378, the Court said, page 380:

> "Good faith alone will not excuse them when there is lack of the proper care, attention and circumspection in the affairs of the corporation which is exacted of them as Trustees."

It is well settled law that no official or individual can ratify either an ultra vires or an unlawful act. These appellees by their motions admit that they unlawfully and illegally paid out these monies in the manner alleged; and there is no such thing as being excused for failure to discharge their duties on account of the ratification of their act by anyone. This was settled by this Court in the case of *Dunn v. O'Connor,* 67 App. D. C. 76. In that case it appeared that the Continental Trust Company had purchased stock in the Commercial National Bank in violation of the Code of Law for the District of Columbia, which prohibited one corporation from purchasing stock in another District of Columbia corporation. This court, following the decision of the United States Supreme Court, held that the purchase of said stock was ultra vires and void and that said purchase could not be cured by ratification or acquiescence.

The Supreme Court of the United States had previously held in the case of *California Banks v. Kennedy,* 167 U. S. 362, 42 L. ed. 198, Mr. Chief Justice White, delivering the opinion, that the California National Bank could not be held liable for an assessment on stock which it owned in the California Savings Bank as the ownership was contrary to law and was wholly void, and of no legal effect and could not be cured by ratification or acquiescence. To the same effect is the case of *Concord v. Hawkins,* 174 U. S. 43 L. ed. 1007.

The charges in the bill of complaint are that these appellees were Trustees. The assets of an insolvent bank are a trust fund for the benefit of the depositors, creditors and stockholders of the institution. The depositors, creditors and stockholders are the beneficiaries of that trust.

Scott v. Armstrong, 146 U. S. 499.
Curran v. Bank of Arkansas, 15 How. 304.
American Bank and Trust Co. v. Hon, 48 Fed. (2d) 588 (C. C. A. 7th).
Hon v. Commercial & Savings Bank, 37 F. (2d) 907.

Brown v. French, 80 Fed. 166, 169.
Rohr v. Stanton Trust & Savings Bank, 76 Mont. 248.

As Trustees they are liable for and held to a strict accountability for the disposition of these funds which came into their hands. By the motions to dismiss they admit that these charges are true; that they were and are trustees and are to be held accountable for these funds as any other trustees acting in a fiduciary capacity. All the authorities hold that trustees are liable without any question.

The appellant contends that he will prove upon a trial of this cause that these monies were paid out contrary to the law; that they were paid out knowingly, willfully and purposely to carry out this plan or conspiracy to wreck the Commercial National Bank of which the appellant was president. Appellant further contends that evidence will show that the appellee, Awalt, as Deputy Comptroller of the Currency, long prior to the payment of these monies had written letters to different people stating, "It is not believed that a National Bank may pledge any of its assets to secure private deposits." One of these letters is dated as early as December 13, 1929, a copy of which was on file in the office of the Comptroller of the Currency. See Note 6, bottom of page 254, in case of *Texas & Pacific Ry. v. Pottorff,* 291 U. S. 245, in which parties stipulated and the District Court found (p. 864) that "during, before and after the said period of February 23, 1928, to July 31, 1930, when the said Comptroller was requested by national banks or others for an opinion upon the power of national banks to pledge securities to secure a private depositor, in every instance the Comptroller disapproved of such pledges by stating that in his opinion national banks had no such power." In addition to the above fact, the case of *Texas and Pacific Railway Company v. S. O. Pottorff, Receiver of the First National Bank of El Paso, Texas,* was decided by the lower Court May 26th, 1932, that Court holding that the bank had no legal right to pledge its assets to secure deposits of the railway company. The Circuit Court of Appeals of the Fifth Circuit, according to the record, on January 19th, 1933, affirmed the judgment of the Trial Court of May 26th, 1932, 63 Fed. (2nd) 1. Therefore, the appellees, had full knowledge of the law and the decisions of the District Court and the Circuit Court of Appeals of the United States when these monies were paid out. These cases were decided sometime prior to the payments of the monies mentioned in the instant case, which were not disbursed until after March 1st, 1933. The action of the Circuit Court of Appeals was subsequently affirmed by the Supreme Court of the United States, 291 U. S. 245. The appellee, George P. Barse, and his co-appellee, J. F. T. O'Connor, Comptroller of the Currency, certainly must have had notice of the unlawful disbursement of whatever monies were disbursed while they were holding their respective positions as attorney and Comptroller of the Currency. The Receiver of the First National Bank of El Paso was, no doubt, simply obeying orders of his superior, the appellees, O'Connor, Barse and Awalt.

A national bank is organized for certain specific purposes, and like any other corporation possesses only those powers which are conferred upon it by law and no other. The Act of June 25th, 1930, Section 5153 U. S. R. S., gives national banks authority to secure public funds, but it does not give any authority to secure private funds. All these appellees are charged with knowledge of this Act of June 25th, 1930, and they are therefore responsible for their acts as Trustees.

On the question of liability of Government officers, we submit that when acting in good faith within the scope of their authority, public officers are not liable in private actions for damages, but when a public officer goes outside of the scope of his duties or acts in a wanton, malicious and unlawful manner, he is liable.

Spalding v. Vilas, 161 U. S. 483; 40 L. ed. 780, 785.
Bradley v. Fisher, 13 Wall. 335; 20 L. ed. 646, 651.
Dynes v. Hoover, 20 How. 65, 83; 15 L. ed. 838, 845.
Flanders v. Tweed, 16 Wall. 504; 21 L. ed. 389, 393.
Yaselli v. Goff, 12 F. (2d) 396.
Sloan Shipyards Corp. v. U. S. Shipping Board Emergency Fleet Corporation, 258 U. S. 566; 66 L. ed. 762, 768.
Tracy v. Swartwout, 10 Pet. (U. S.) 80; 9 L. ed. 354, 359, 361.
Little v. Barreme, 2 Cranch (U. S.) 170; 2 L. ed. 243.
In re Waite, 81 F. 359, 363.
Philadelphia C. v. Stimson, 223 U. S. 605; 56 L. ed. 570, 576.
Scheer v. Moody, et al., 48 F. (2d) 327, 330.
American School of Magnetic Healing v. McAnulty, 187 U. S. 94; 47 L. ed. 90, 91, 96.
Noble v. Union River Logging R. R. Co., 147 U. S. 165, 171, 172; 37 L. ed. 123, 125, 126.
Dinsman v. Wilkes, 12 How. (U. S.) 390; 13 L. ed. 1036, 1041.
Greeley v. Thompson, 10 How. (U. S.) 225; 13 L. ed. 397, 402.

Even judges, knowingly acting without jurisdiction maliciously and corruptly, are liable to civil action for their acts.

> *Randall v. Brigham,* 7 Wall. (74 U. S.) 523; 19 L. ed. 285, 291.
> *Bradley v. Fisher,* 13 Wall. 335; 20 L. ed. 646, 651.
> *Leong Yau v. Carden,* 23 Hawaii 362, 369.
> *Dynes v. Hoover,* 20 How. 65, 83; 15 L. ed. 838, 845.

Appellees in their motion say that the payment of $12,000 fee to Rhodes or his lawyers was an administrative act of the Comptroller of the Currency, approved by the Court and they are not liable for this illegal and unlawful act. The appellee knew that this decree agreed to by them and approved by the Court was illegal and unlawful and ultra vires and void; they certainly know that this was a wrongful appropriation of the funds of the depositors in the attempt to extricate them for failure to do their duties as Trustees. This was a consent order and we prefer to believe that it was approved by the Court without knowing its full import, but regardless of that fact, the order is ultra vires and void as well as the monies being a misappropriation of the funds of the depositors. A mere statement of the facts is all sufficient to show that this was a wrongful payment and in fraud of the rights of the depositors and the motion to dismiss admits these allegations of the bill.

The appellees in their motion to dismiss say that the cause of action accrued more than three years prior to the filing of the bill, and that plaintiff is guilty of laches.

The bill does not, as claimed by appellees, show on its face that the cause of action accrued more than three years prior to the filing of the bill. The bill sets forth (R. 6) that appellant did not learn of the unlawful payments for a long time subsequent to the appointment of the receiver, that he is denied access to the books and records of said bank, is unable to give the dates of said unlawful payments and actions and asks for a discovery and accounting from said appellees. Certainly appellant is not barred from maintaining his action by suggestion of being guilty of laches when the record does not disclose when the unlawful acts took place and that the appellees deny appellant access to the books and records of said bank (although he is its president), and admit having secretly and unlawfully paid out the monies due to the creditors.

Appellees' motion to dismiss admits appellant's contention that they have made the unlawful payments, that they have denied appellant access to the books and records of said bank.

Defense of statute of limitations cannot be raised by demurrer in action at law, though declaration shows on its face that statutory period has expired.

French v. District Title Ins. Co., 64 App. D. C. 131, 75 F. (2d) 650. In that case Justice Groner (now Chief Justice) said:

> "In this jurisdiction the defense of the statute of limitations in an action at law cannot be raised by demurrer, and we think this rule obtains even where the declaration shows on its face that the statutory period has expired. The reason of this is that the plaintiff is entitled to an opportunity to avoid the bar, if he can, by replication."

Ruling Case Law Vol. 10, Page 143, makes the following comment on the subject of laches,

> "While statements are to be found in some of the cases intimating that unreasonable delay and

> mere lapse of time, independently of any statute of limitations, constitutes a defense in a Court of equity, the generally accepted doctrine appears to be that laches is not like limitation, a mere matter of time, but is principally a question of the inequity of permitting a claim to be enforced, this inequity being founded on some change in the condition or relations of the property or the parties. Since lapse of time has a tendency to obscure evidence, and often makes it impossible to discover the truth, it is, one of the elements to be considered by the Court in applying laches to stale claims, but is only one, and while important, it is not ordinarily the controlling or most important one."
>
> "Hence it has been said, laches in legal significance, is not mere delay, but delay that works a disadvantage to another."
>
> "So long as parties are in the same condition it matters little whether one presses a right promptly or slowly within the limits allowed by law" * * *.

In the instant case the appellants blow hot and cold. In one breath, they beg for delay until the suit brought by Receiver Baldwin of the Commercial National Bank to recover the money unlawfully disbursed is finally disposed of, and in the next breath they complain of the delay of the appellant.

"O consistency thou are a jewel."

How are we to deal with men who blow hot and cold? How much sincerity is this Honorable Court to attach to anything they say or any position they take? In the instant case the parties are the same, the issues are the same. There has not been any change in the situation or to parties or as to the monies wrongfully disbursed. Whatever delay there has been, has been to the advantage and not to the disadvantage of the defendants. The defendants know this. Vol. 21 Corpus Juris, Page 219 reaffirms the principles laid down in Ruling Case Law to which reference has already been made. It says, among other things, laches is, not like limitations, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced and inequity founded on some intermediate change in conditions. Continuing this same authority in Vol. 21, Page 223, says, "To constitute a defense, the delay must have been such as to practically preclude the Court from arriving at a safe conclusion of the matters in controversy, and thus make the doing of equity either doubtful or impossible, as through loss or obscurity of evidence of the transaction is issue" * * *. This principle of laches seems to be rather alphabetical or elementary and certainly is known to the defendants or their distinguished counsel.

Appellees claim that no demand was made upon the bank corporation to bring the suit and in the absence of such demand, appellant cannot maintain the suit. The Comptroller of the Currency and his attorneys have always contended that when a bank is in the hands of Receiver, the Receiver alone has the right to maintain suit. In the instant case the Receiver joined the appellees in the unlawful payments of these funds and it would be a vain thing to ask the Receiver to bring suit against himself and his superiors for the collection of these monies. The authorities all agree, including the U. S. Supreme Court, that a plaintiff will not be required to do a vain or foolish thing such as has been suggested by the appellees.

It is submitted that the Record discloses that the appellees and their agent the Receiver were the parties guilty of the wrong and fraud alleged in the bill. It is fundamental that while the appointment of a receiver does not work a dissolution of the bank (*Bethel Bank* *v. Pahquioque Bank,* 14 Wall. 383), the Comptroller and his receiver are in effect the bank—they represent the bank.

Scott v. Armstrong, 146 U. S. 499.
Case v. Terrell, 11 Wall. 199.

It, therefore, appears that the Comptroller and his receiver are in control. The question then is—must a party appeal to the confessed wrongdoers when they have complete domination and control of all legal means by which they may be called to account or by which their wrongful acts may be redressed? The fallacy of the proposition is clearly demonstrated by its mere statement. Such is the case before this court. The courts have uniformly held that it is unnecessary to allege demand and refusal where the facts of the bill show that the wrongdoers are in actual control of the body having legal capacity to institute suit.

United Copper Securities Co. v. Amalgamated Copper Co., 244 U. S. 261.
Delaware & Hudson Co. v. Albany & Susquehanna R. Co., 213 U. S. 435.
Doctor v. Harrington, 196 U. S. 579.
Booth v. Greer Inv. Co., 62 F. (2d) 321.
Krouse v. Brevard Tannin Co., 249 Fed. 538.
Flynn v. Third National Bank, 122 Mich. 642.
Brinckerhoff v. Bostwick, 88 N. Y. 52. Writ of error dismissed, 106 U. S. 3.

In like manner the Comptroller and receiver were personally interested in this matter. The Comptroller and receiver are in substance statutory trustees (*supra,* pages 5, 6). A trustee is personally responsible for unauthorized disbursements of trust funds. The fact that such payments were made in good faith or under mistake of law does not affect his liability. He is personally liable for his illegal conduct.

In re Kalb & Berger Mfg. Co., 165 Fed. 895, 896 (C. C. A. 2d, 1908).

Kendall v. DeForest, 101 Fed. 167, 169 (C. C. A. [2d], 1900).
Grant v. Spokane Nat'l Bank, 47 Fed. 673 (C. C. Wash. 1891).
Bearn v. Winans, 111 Md. 434, 473, 74 Atl. 626 (1909).
Owings v. Rhodes, 65 Md. 408, 416 (1886).

Similarly a public official is an insurer of funds placed in his care and custody.

Smyth v. United States, 188 U. S. 156.
United States v. Prescott, 3 How. 578.
Hoyt v. McGrath, 279 Ill. 550, 117 N. E. 74.
Pac. Railway Co. v. Owens, 86 Minn. 188.
Nason v. Directors of the Poor, 126 Pa. 445.

Cases of trusts fall within the equity jurisdiction of the Federal Courts, *Olrich v. Spain,* 15 Wall. (U. S.) 211. Says the Encyclopedia of Pleading and Practice, Vol. 22, Page 9, "Courts of equity have original, inherent, plenary, and exclusive jurisdiction over all trusts and trustees." Citing authorities—continuing this same authority says "Independent of statute, Courts having equity jurisdiction have full and complete jurisdiction over trusts," citing authorities, and continuing, "The enforcement and *protection* of trusts is a matter peculiarly within the jurisdiction of courts of equity," citing authorities and concluding with this observation "and the jurisdiction of such Courts to declare and enforce trusts and supervise the administration thereof is undoubted." "Trusts are children of equity, and in a court of equity, they are at home—under the family roof tree, and around the hearth of their ancestor. A court of law may entertain them, but when the case is complicated, especially when it has a flavor of fraud, equity will not banish them and remit the parties to another forum. Equity delights in protecting trusts, and it delights no less in obliging trustees and trust estates to render all men their due." *Kupherman v. McGee,* 63 Ga. 250, 256.

Conclusion.

It is respectfully submitted that the bill of complaint states a *prima facie* case and therefore that the action of the lower Court in dismissing the bill should be reversed.

Respectfully submitted,

GEORGE B. FRASER,
Attorney for Appellant.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA
FILED MAR 29 1938
Joseph W. Stewart
CLERK

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

April Term, 1938.

No. 7254.

Wade H. Cooper,
Appellant,

v.

J. F. T. O'Connor, individually and as Comptroller of the Currency of the United States; F. G. Awalt, individually and as Former Acting Comptroller and Former Deputy Comptroller of the Currency of the United States; and George P. Barse, individually and as Counsel for the Insolvent Division of National Banks and as General Counsel for the Comptroller of the Currency of the United States,
Appellees.

BRIEF ON BEHALF OF APPELLEES J. F. T. O'CONNOR, F. G. AWALT AND GEORGE P. BARSE.

Brice Clagett,
Charles E. Wainwright,
George B. Springston,
Attorneys for Appellees.

Press of Byron S. Adams, Washington, D. C.

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Appellees.

BRIEF ON BEHALF OF APPELLEES J. F. T. O'CONNOR, F. G. AWALT AND GEORGE P. BARSE.

STATEMENT OF PROCEEDINGS BELOW.

On February 7, 1938, appellant, plaintiff below, filed a bill of complaint (R. 2) against appellees, J. F. T.

O'Connor, F. G. Awalt and George P. Barse, individually, and as Comptroller of the Currency of the United States, as former Acting Comptroller and former Deputy Comptroller of the United States, and as Counsel for the Insolvent Division and General Counsel for the Comptroller, respectively. Appellees O'Connor and Awalt have resigned and are no longer in office. Robert C. Baldwin, sued individually and as former receiver of the Commercial National Bank of Washington, D. C., was also joined as a party defendant, but not having been served with process below and no appearance having been entered for him, he is not a party to this appeal. The bill sought an accounting, and a personal judgment for damages against each of the defendants for the sum of approximately $2,012,000.00, and interest, because of the alleged illegal payments in full of certain depositors to whom the bank had pledged its assets to secure repayment of their deposits in the Commercial National Bank of Washington, D. C., described in the bill.

This action is grounded upon three claims, namely:

1. That the Commercial National Bank prior to its insolvency and closing had received deposits from various governmental agencies, namely, the Panama Canal, the Philippine Islands, Inland Waterways Corporation, Merchant Fleet Corporation, and the Alien Property Custodian, and had secured such deposits by the pledge with such governmental agencies of bonds or other securities belonging to the bank; that such pledging of the bank's assets as security for such deposits was illegal and void; that subsequent to the closing of the bank and the appointment of a receiver therefor, such secured deposits were paid in full by redemption, or by the sale by the pledgees of the securities and the appli-

cation of the proceeds of sale to pay such deposits; that such redemptions or sales of pledged securities were made by defendants Baldwin and Barse under the direction, or with the ratification and approval of defendants O'Connor and Awalt; that the creditors and depositors and stockholders of the bank are entitled to recover from defendants (including appellees) the difference between what was actually received by such depositors and the amount which should have been paid to them as general creditors of the bank, such difference being alleged as "about" $1,000,000.

2. That the bonds sold to pay the depositors in full were "negligently allowed to be sold by the defendants at a sacrifice and a loss" and that the loss on account of such sale of such bonds was about $1,000,000, and that defendants are liable therefor.

3. That defendant Baldwin under the direction or with the approval of defendants O'Connor and Barse sued the depositors described to recover the preferential payments, but that before the Receiver filed such suit, a depositor, Thomas E. Rhodes, filed a similar suit for the same purpose, and that defendant Baldwin, with the consent and approval of defendants O'Connor and Barse, caused the suit by Rhodes to be "merged or consolidated" with the Receiver's suit, or caused the Rhodes suit to be stayed, or abandoned, and in connection therewith, defendant Baldwin under the direction of or with the consent and approval of defendants O'Connor and Barse wrongfully paid Rhodes, or his attorneys $12,000 out of money belonging to the Commercial National Bank.

Based upon such allegations, a judgment was sought by plaintiff against the defendants for the above sum of $2,000,000 plus interest, and for the above mentioned sum of $12,000 plus interest.

In order that the averments made in the bill should not go unanswered, appellees, being public officers or former public officers, filed a joint answer (R. 8) on March 14, 1938, and also moved (R. 27) that the Court below consider the points of law raised in the answer, and upon such points to dismiss the bill upon the grounds (1) that the bill of complaint averred no facts which entitled plaintiff to the relief prayed for and the facts stated were not sufficient to state a cause of action against the defendants; (2) that the bill of complaint attempted to attack the validity and effect of acts performed by administrative and executive officers of the United States which were performed in the exercise of discretion and authority vested in them by law; (3) that the pledges of assets complained of were all made prior to the closing of the Commercial National Bank and while said bank was under the management of its own officers and directors and stockholders and that such pledges were made or ratified by plaintiff as president of the bank and it was not shown that the defendants or any of them played any part in the making of such pledges and that plaintiff is estopped from complaining because of the sale or application of the pledged collateral; (4) that government officials are not personally responsible for mistakes of law made by them; (5) that the Court will take judicial notice of its records showing that the payment of the $12,000 fee complained of was made in the course of the administration of the affairs of a closed national bank and was within the discretion of the Comptroller of the Currency, and approved by the Trial Court, and, therefore, no cause of action arose by reason thereof in favor of appellant; and (6) that the bill of complaint showed on its face that the alleged causes of action occurred more than three years prior to the filing of such complaint and that the appellant had been guilty of laches.

The court below after hearing, granted said motion and dismissed the bill (R. 34), whereupon appellant perfected this appeal (R. 35).

The deposits in the Commercial National Bank at the date of closing, which had been secured before closing, and on account of which preferential payments were made, were as follows (R. 3, 4):

Inland Waterways Corporation, a corporation:	
Savings Account—approximately	$271,113.05
Checking Account—approximately	211,543.53
The United States Shipping Board Merchant Fleet Corporation, a corporation:	
Agent deposit account — approximately	264,302.16
Agent good faith deposit account—approximately	144,995.12
Government of Canal Zone:	
Savings Account—approximately	711,622.92
Treasurer of Philippine Islands:	
Treasury Certificate Fund Account—approximately	1,003,602.74
Howard Sutherland, Alien Property Custodian, Special Account No. 2—approximately	162,298.93

ADDITIONAL STATEMENT OF FACTS.

In view of the statement of facts contained in appellant's brief, the following facts will be helpful in clarifying the issues of this case.

1. The pledges of the assets of the Commercial National Bank involved in this action were all made prior to the closing of the bank (R. 4) and were made by the officers and directors of the bank. Appellant in his brief (p. 17) states that he was president of such bank and while this fact does not appear in the record, this Court may assume this was the case for the purpose of this appeal as it did in another case involving the same parties, namely, *Cooper* v. *O'Connor*, et al., 99 F. (2d) 135, 137, and in still another case involving the same parties, namely, *Cooper* v. *O'Connor*, et al., 99 F. (2d) 143. It follows that the basic illegality, namely the making of the pledges in question to secure deposits in the Commercial National Bank, was performed or ratified by appellant himself and, therefore, he is estopped from complaining that the pledge agreements made or ratified by him were permitted to be performed by appellees.

2. All of the acts complained of (with the exception of the payment of the $12,000 counsel fee) took place prior to February 5, 1934, when the United States Supreme Court in the cases of *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, and *City of Marion* v. *Sneeden*, 291 U. S. 262, held that the securing of deposits of a railroad and a municipality were *ultra vires* of national banks and void and expressed views which later led this Court in *O'Connor* v. *Rhodes*, 79 F. (2d) 146, 149, to hold that some of the secured deposits of the governmental agencies here involved were likewise void. In so deciding this Court said that the question as to such governmental agencies was "new" (p. 149). Prior to the *Pottorff* and *Sneeden* decisions in February 1934 banks and officials generally, including plaintiff and other officers of the Commercial National Bank, and the

successive Comptrollers of the Currency and members of their staffs, believed such pledges were lawful. *O'Connor* v. *Rhodes,* 79 F. (2d) 146, 149.

Such situation was summed up in *Marion* v. *Sneeden, supra,* as quoted by this Court in *O'Connor* v. *Rhodes, supra,* as follows (at p. 149):

> "For the reasons stated in Texas and Pacific Ry. Co. v. Pottorff, 291 U. S. 245, 54 S. Ct. 416, 78 L. Ed. 777, decided this day, we are of the opinion that the Act of 1864 did not confer the power to pledge assets to secure any public deposits except those made under Section 45 by the Secretary of the Treasury of the United States. The power conferred by each later act, except that of 1930, was limited to securing specific federal funds. A national bank could not legally pledge assets to secure funds of a state, or of a political subdivision thereof, prior to the 1930 amendment; and since then it can do so legally only if it is located in a state in which state banks are so authorized. In some states national banks had, prior to the 1930 Amendment, frequently pledged assets to secure public deposits of the state or of a political subdivision thereof; Comptrollers of the Currency knew that this was being done; and they assumed that the banks had the power to do so. But the assumption was erroneous. The contention that such power is generally necessary in the business of deposit banking has not been sustained."

The various Circuit Courts of Appeal have uniformly recognized that pledges of the type here in question made under a mistake of law were made in good faith, and that the liquidating officers in recognizing such pledges considered the pledges valid until the subsequent authoritative determinations by the Supreme Court in the *Pottorff* and *Sneeden* cases.

This is indicated by *LaParr* v. *City of Rockford*, 100 F. (2d) 564, 567:

> "It is of no moment that the bank and the city, in the original transaction, and the comptroller and the receiver on the one hand and the city on the other, in their transactions, acted in the utmost of good faith. All of the parties assumed that the pledge was valid. Their assumption was incorrect, but that it was erroneous was not authoritatively established by the Supreme Court until after the payment of the deposit to the city."

Similar conclusions were reached by **Parker**, J. speaking for the Circuit Court of Appeals for the Fourth Circuit in *Leonard* v. *Gage*, 94 F. (2d) 19, 26, and **Sibley**, J. speaking for the Circuit Court of Appeals, Fifth Circuit in *City of Fort Worth* v. *McCamey*, 93 F. (2d) 964, 967.

3. As shown by the bill of complaint (R. 5), shortly after the decision of the United States Supreme Court in the Pottorff and Sneeden cases, *supra*, Thomas E. Rhodes, as a depositor of the Commercial National Bank, filed the suit decided in *O'Connor* v. *Rhodes*, *supra*, against the United States Shipping Board Merchant Fleet Corporation, and other governmental or semi-governmental agencies, to recover from such agencies for the depositors of the bank the sums preferentially paid those agencies as a result of the pledges involved in this action. As to the pledges here involved (there was another one made to the Comptroller of the Currency himself, which was held to be legal by this Court in *O'Connor* v. *Rhodes*, *supra*) the then Comptroller of the Currency, appellant O'Connor, resisted the suit of Rhodes upon the ground that the Receiver, rather than a depositor, had the right to bring such suit.

This Court decided, however, that the depositor did have the right to maintain such suit, but upon motion for reargument this Court noted that the receiver had instituted a suit for this purpose against the various governmental, or semi-governmental agencies (decided by this Court in *Inland Waterways Corporation, United States Shipping Board Merchant Fleet Corporation, Panama Canal, et al.,* v. *Hardee,* 100 F. (2d) 678, and *Cummings, Attorney General* v. *Hardee, Receiver,* #7127, decided January 23, 1939). In *O'Connor* v. *Rhodes,* this Court then (p. 153) submitted to counsel the query "whether this Court had power in deference to the usual and orderly administration of the affairs of insolvent national banks, to direct the trial court to stay further proceedings" in the Rhodes suit "pending prosecution by the receiver of the suit filed by the receiver upon the same items" embraced in the Rhodes suit. This Court further noted that counsel doubted the authority of this Court to stay proceedings in the Rhodes case, but added that "we say this without prejudice to the right of the trial court, on motion and in the exercise of its judicial discretion, and on such reasonable terms as it may impose, to arrange the order of trial in the two suits as may result in the most economical and speedy determination of the issues involved."

In accordance with the above quoted statement of this Court in *O'Connor* v. *Rhodes,* the Trial Court in the exercise of its judicial discretion, signed a consent order (R. 25) *staying* further proceedings in the Rhodes case upon the terms and conditions that the Receiver should proceed with his suit, that the receiver should pay forthwith Rhodes for his counsel on account of their services rendered in the Rhodes case the sum of $12,000 and that upon the final determination of both actions, Rhodes would be entitled to make application for reasonable compensation for counsel and for reimbursement of his proper and necessary costs and expenses to be fixed by the Court.

4. The records of this Court in *O'Connor* v. *Rhodes, supra, Inland Waterways, et al.*, v. *Hardee, supra,* and *Cummings, Attorney General,* v. *Hardee, supra,* show that the receiver with the approval and under the direction of the appropriate officials in the office of the Comptroller of the Currency have ever since been pursuing the recovery of all such preferential payments.

5. While the bill of complaint characterizes the above described acts of appellees as "illegal, unlawful and in fraud" of the depositors and creditors of the bank, emphasis must be placed upon the complete failure of the appellant to allege any facts pointing to actual fraud, collusion, or bad faith.

THE QUESTION PRESENTED.

In this situation the question is presented as to whether appellees,—present and former officers of the United States, in charge of the liquidation of closed national banks and the payment of claims,—can be held personally liable in damages for permitting the carrying out of pledge agreements made by the bank's officers prior to closing and for expending money for counsel fees in efforts to recapture preferential payments made pursuant to such pledge agreements.

SUMMARY OF ARGUMENT.

Public officers in the performance of their official duties, and in the exercise of the discretion vested in them by law, cannot be held personally liable for any alleged damage that may result because of an erroneous construction or application of the law. All of the acts complained of herein were acts which appellees were required to perform in the course of and within the scope of their official duties. In the absence of the clearest showing of actual fraud an action to hold them to a personal liability cannot be maintained, and no actual fraud is here shown.

The National Bank Act required appellees to perform certain administrative and discretionary duties in connection with the liquidation of the insolvent Commercial National Bank of Washington, D. C., and appellees cannot be held personally liable even though they may have made mistakes of law in the official performance of their duties.

After the bank had failed and after it had been indicated by the Supreme Court that pledges of the type here in question might be illegal, it was the duty of appellees, who in no way participated in or were concerned with the original unlawful pledges, to take appropriate steps for the recovery of the pledged securities or their proceeds. Appellant admits this has been done.

There is no averment in the bill of complaint that the acts complained of were wanton or malicious. No facts even indicating fraud are averred in the bill of complaint.

The appellant has no standing in court. As president of the bank he either made or ratified the illegal pledges. He is guilty of laches, and in any event, the cause of action, if one exists, is vested in the creditors, not in appellant who is only a stockholder.

ARGUMENT.

1. The acts of which appellant complains were all performed by appellees as public officers within the scope of their duties and authority and hence no liability attaches to such officers.

In applying the law to the case, the Court will observe that the foundation of appellant's claim for damages against appellees is derived from certain unlawful and illegal pledges, all of which were made while the bank was a going concern, during which period said original unlawful pledges of the bank's assets were either made or ratified by appellant while president of the bank.

a. *If the acts complained of were within the scope of the officers' duties, they are not liable for civil damages because of an erroneous construction or application of the law.*

The principles of law here involved and the applicable facts were summed up completely by this Court in the case of *Cooper* v. *O'Connor,* 99 F. (2d) 135, *supra,* decided as recently as June 27, 1938. In that case, this Court stated (at p. 137):

> "It may be argued persuasively that all public officers should be required to answer a declaration such as that of appellant and respond on the merits. But the courts have been unwilling to go so far. The situation is one in which a serious conflict arises between considerations of public policy: One, the protection of the individual citizen against oppressive official action, and the other, the protection of the whole people by protecting their officers against vindictive and retaliatory damage suits, in order to insure their fearless and

effective administration of the law.'' Randall v. Brigham, 7 Wall. 523, 536, et seq., 19 L. Ed. 285.''

''There is a general rule that a ministerial officer who acts wrongfully, although in good faith, is nevertheless liable in a civil action and cannot claim the immunity of the sovereign.[2] There is also a general rule that if any officer—ministerial or otherwise—acts outside the scope of his jurisdiction and without authorization of law, he is liable in an action for damages for injuries suffered by a citizen as a result thereof. See *Bradley* v. *Fisher*, 13 Wall. 335, 351-352, 20 L. Ed. 646.[3] On the contrary, if the act complained of was done within the scope of the officers' duties as defined by law, the policy of the law is that he shall not be subjected to the harassment of civil litigation or be liable for civil damages because of a mistake of fact occurring in the exercise of his judgment or discretion,[4] or because of an erroneous construction and application of the law.[5] This rule of immunity was first applied and has been most universally observed in the case of judges, presumably because considerations of public policy operate most strongly in their favor. But even as to them the rule does not operate in cases in which they act without jurisdic-

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[2] *Tracy* v. *Swartwout*, 10 Pet. 80, 95, 99; *Little* v. *Barreme*, 2 Cranch 170. See *Philadelphia Co.* v. *Stimson*, 223 U. S. 605. 618, et seq.; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 108, 110; *Hopkins* v. *Clemson Agricultural College*, 221 U. S. 636, 642, 643; *Sloan Shipyards* v. *United States Shipping Board Emergency Fleet Corporation*. 258 U. S. 549, 566-568; *Bates* v. *Clark*, 95 U. S. 204; *Cammeyer* v. *Newton*, 94 U. S. 225, 234-235; *Belknap* v. *Schield*, 161 U. S. 10, 18; *Scheer* v. *Moody*, D. C. Mont., 48 F. (2d) 327, 330.

[3] See also, *Overmyer* v. *Barnett*, 70 Ind. App. 569, 583, 123 N. E. 654, 658; *Russell* v. *Considine*, 101 Kan. 631, 635-636, 168 P. 1095, 1097; *Ray* v. *Dodd*. 132 Mo. App. 444, 448, 112 S. W. 2, 3.

[4] *Kendall* v. *Stokes*, 3 How. 87, 98; *De Arnaud* v. *Ainsworth*, 24 App. D. C. 167, 178; *Mellon* v. *Brewer*, 18 F. (2d) 168, 172, 57 App. D. C. 126, 130, cert. denied, 275 U. S. 530; *Brown* v. *Rudolph*, 25 F. (2d) 540; 58 App. D. C. 116, cert. denied, 277 U. S. 605.

[5] *Standard Nut Margarine Co.* v. *Mellon*, 72 F. (2d) 557, 63 App. D. C. 339, cert. denied, 293 U. S. 605; *Lang* v. *Wood*, 92 F. (2d) 211, 67 App. D. C. 287.''

> tion over the subject-matter. Bradley v. Fisher, supra, at page 351. The first question to be decided, therefore, is whether the acts complained of in the present case come within the general scope of the duties of the several appellees.''

The principles defined above by this Court in *Cooper* v. *O'Connor,* 99 F. (2d) 135, with respect to these specific appellees were fully clarified and defined in *Bradley* v. *Fisher,* 13 Wall. 335, cited with approval in this connection by this Court as shown above. Thus, the Supreme Court in *Bradley* v. *Fisher, supra,* (p. 353) in tracing the history of the principles involved quoted the rule from *Ackerly* v. *Parkinson,* 3 M. & S. 411, as follows :

> ''Mr. Justice Blanc said there was 'a material distinction between a case where a party comes to an erroneous conclusion in a matter over which he has jurisdiction and a case where he acts wholly without jurisdiction'.''

Such distinction was clarified by the Supreme Court in the same case of *Bradley* v. *Fisher, supra,* (p. 351-352) as follows:

> ''A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case

> although upon the correctness of his determination in these particulars the validity of his judgments may depend."

This rule was followed in *Booth, et al.* v. *Fletcher*, 67 W. L. R. 162, decided by this court Dec. 19, 1938.

The result is inescapable, therefore, upon the authority of this Court with respect to these specific appellees and also upon the authority of the United States Supreme Court that unless there is a clear absence of jurisdiction of the subject matter with respect to which appellees made decisions or performed acts, they are not liable for damages even though they made an erroneous construction and application of the law.

b. *Appellees were all public officers of the United States when the acts complained of were performed.*

The fact that the appellees in this case, namely, O'Connor, Awalt, and Barse, and defendant Baldwin, were public officers and the statutes and decisions outlining their authority was discussed fully and decided by this Court in *Cooper* v. *O'Connor*, et al., 99 F. (2d) 135, at p. 139. ✓ The only difference between such former case and the instant case is that in the former case the bill of complaint did not show their offices and hence the Court relied upon its right to take judicial notice of their titles and duties and also relied upon concessions made in appellant's brief for the same purpose, whereas in the instant case, the official capacities of appellees are specifically pleaded in the bill of complaint (R. 2, 3). As shown by the bill of complaint, appellee O'Connor was Comptroller of the Currency of the United States; appellee Awalt was formerly the Acting Comptroller of the Currency and Deputy Comptroller of the Currency of the United States; appellee Barse was counsel for the Insolvent Division of National Banks and is General Counsel for the Comptroller of the Currency of the United States; and defendant Baldwin was formerly the Receiver of the Commercial National Bank of Washington, D. C. Further, the bill of complaint (R. 4, 5, and 6) clearly shows that all of the acts complained of were performed by defendants while acting in their official capacities.

Since this case is before the Court on an appeal from a motion to dismiss, *facts* pleaded in the complaint are here treated as true, although records of this Court in cases involving the same subject matter and one or more of the parties to this action, namely, *O'Connor* v. *Rhodes,* 79 Fed. (2d) 146; *Inland Waterways Corporation,* et al. v. *Hardee,* 100 F. (2d) 678, show that many statements pleaded in the complaint as facts are not true: For example it is pleaded here that appellee O'Connor participated in or approved the sale of or redemption of all the pledged securities, whereas, in fact, appellee O'Connor had not yet become Comptroller of the Currency when the securities pledged to secure all of the deposits involved except those of the Panama Canal were sold or redeemed.

The status of these parties as Federal officers is fixed by Federal Law. The Act of Congress of June 3, 1864, Sections 1 and 2, Title 12, U. S. C., created the Bureau of Comptroller of the Currency and created the office of Comptroller of the Currency. Section 4 of said title created the office of Deputy Comptroller of the Currency and authorized such Deputy Comptroller to become Acting Comptroller during a vacancy in the office or in the absence or inability of the Comptroller, and Section 9 of the same title gives to the Comptroller authority to employ such employees as may be necessary to carry on the work prescribed by said act. These provisions are a part of the so-called National Bank Act which the Supreme Court of the United States has described as "a complete system for the establishment and government of national banks" for which purpose everything essential is fully provided for, "as in a separate code by itself." *Cook County National Bank* v. *United States*, 107 U. S. 445.

Receivers are appointed by the Comptroller of the Currency to administer insolvent national banks and they derive their authority under Sections 191 and 192 of said Title 12 U. S. C., so that at the time the acts complained of were performed defendant Baldwin was also an officer of the United States.

Port Newark v. *Waldron*, 46 F. (2d) 296;
U. S. v. *Weitzel*, 246 U. S. 533;
In re Chetwood, 165 U. S. 443;
Auten v. *U. S. Nat. Bank*, 174 U. S. 125;
Keyser v. *Hitz*, 133 U. S. 138;
Altman v. *McClintock*, 20 F. (2d) 226;
Roth v. *Baldwin* (D. C.) 74 F. (2d) 1003;
Cooper v. *O'Connor* (D. C.) 99 F. (2d) 135.

There can be no question, therefore, that all of the defendants including appellees, were public officers of the United States entrusted with the administration and liquidation of the affairs of all insolvent national banks, including the Commercial National Bank of Washington, D. C., at the time the acts complained of were performed.

c. *Summary of specific acts alleged to have been committed by appellees.*

Following the test laid down by this Court in *Cooper v. O'Connor,* 99 F. (2d) 135, (at p. 138) the next inquiry is: What are the specific acts alleged to have been committed by appellees?

Noting that the alleged illegal pledges had been made or ratified by appellant and other officers of the bank prior to closing and that there is no averment in the complaint that any of appellees had anything to do with the making of such pledges, the specific acts averred in the complaint to have been committed by appellees were: (1) "defendants Baldwin and Barse under the direction of their co-defendants O'Connor and Awalt or with their ratification and approval paid in cash or caused to be paid by sale of the said bonds held by all the above named depositors, the proceeds of the sale of said bonds being used to pay all of the above named amounts owing to the above named depositors as aforesaid (R. 4); (2) that the appellees "allowed" the pledged securities to be sold at a sacrifice and a loss (R. 7); (3) that the defendant O'Connor "contested" the right of the depositor Rhodes to recover the money paid out (R. 5); and (4) that defendant "O'Connor or his duly (sic) agent, Baldwin, by and with the consent and approval of defendants O'Connor and Barse" entered into a plan for the staying of the Rhodes suit while a suit brought by defendant Baldwin proceeded and that defendant Baldwin "under the direction of or the consent and approval of" defendants O'Connor and Barse paid Rhodes or his attorneys $12,000 of the bank's funds (R. 5).

Stated in more direct language, the acts complained of were that (1) the defendants permitted the pledge contracts made by the bank before closing to be carried out and the pledged securities to be sold, or allowed in full claims based upon such pledge contracts; and (2) paid out attorney's fees of $12,000 in compensation for work done by Rhodes' attorneys in prosecuting an action for recovering money for the depositors.

In view of various averments in the bill of complaint, and in view particularly of the argument advanced in appellant's brief, it must be re-emphasized that it was *the bank* (of which appellant was president) that made the pledge contracts, most of which this Court has since held to have been illegal, *ultra vires* and void; and that the only part, if any, played by appellees in the transaction was the alleged affirmation and carrying out of such contracts *after* the closing of the bank. The bill of complaint in paragraph numbered 7 (R. 5) describes the case of *O'Connor* v. *Rhodes*, 79 F. (2d) 146. The opinion of this Court in that case described the acts of the bank and the receiver and the Comptroller by stating that "* * * the bill charges that prior to the appointment of the receiver, the bank had contracted with certain persons and corporations unlawfully and in contravention of the banking laws of the United States, and the Comptroller and his receiver adopted and confirmed such unlawful contracts * * *."[1]

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[1] In the instant case, appellant makes no claim on account of the secured deposit in the bank in the name of the Comptroller of the Currency, which likewise was sought to be recovered in *O'Connor* v. *Rhodes*, *supra*, and which this Court in that case assigned as the chief reason for holding that the creditor Rhodes could sue. This Court held that deposit was specifically authorized by an Act of Congress and was legal and, therefore, could not be recovered on behalf of the bank.

d. *The acts charged against appellees fell within the scope of their duties and authority.*

Still following the test laid down by the Court in *Cooper* v. *O'Connor,* 99 F. (2d) 135, (at p. 138), the next inquiry is whether the acts charged in the complaint fell within the general scope of their (appellees') duties and authority.

The discussion of the authority or jurisdiction of these same defendants, O'Connor, Awalt, Barse and Baldwin, made by this Court in the last cited *Cooper* v. *O'Connor* case (at p. 139) is equally applicable here. It follows:

> "We are equally satisfied that the alleged actions of appellees O'Connor, Lyons, Awalt, Barse and Baldwin were within the scope of authority of each of them. Section 324, R. S., as amended (12 U. S. C. A. sec. 1) provides that: 'There shall be in the Department of the Treasury a bureau charged with the execution of all laws passed by Congress relating to the issue and regulation of a national currency secured by United States bonds and, under the general supervision of the Board of Governors of the Federal Reserve System, of all Federal reserve notes, the chief officer of which bureau shall be called the Comptroller of the Currency and shall perform his duties under the general directions of the Secretary of the Treasury.' Thus, the Comptroller has been vested with general administrative powers and duties—even though they may be judicial in character—for the administration of the national banking laws. Altman v. McClintock, D. C. Wyo., 20 F. 2d 226, 231, appeal dismissed, 9 Cir., 28 F. 2d 1007. In this capacity he is charged with the duty of supervising national banks. It is within his power, when he deems it necessary, to take possession of the assets of a bank and assume control of its operations. United

States v. Weitzel, 246 U. S. 533, 540, 38 S. Ct. 381, 62 L. Ed. 872. For this purpose he may appoint a receiver and place him in complete charge, as directed by Sec. 5234, R. S. (12 U. S. C. A. Sec. 192). The duties of a receiver appointed by the Comptroller, as set out in Sec. 5234, R. S. (12 U. S. C. A. Sec. 192) are, and are intended to be, comprehensive and inclusive. '*The receiver,* unlike a president, director, cashier, or teller, *is an officer,* not of the corporation, but *of the United States.'* [Italics supplied.] United States v. Weitzel, supra, at page 541, 38 S. Ct. at page 382. See, also, Port Newark National Bank v. Waldron, 3 Cir. 46 F. 2d 296.

"Relying upon the presumption that a public officer acts within the authority conferred upon him in accordance therewith—in the absence of allegation or proof to the contrary—there is no reason to doubt that appellees Lyons, Awalt and Barse were acting within the authority conferred upon them by their superior officers in the present case. Moreover, as to appellee Barse, we take judicial notice of the fact that a general counsel must have knowledge of affairs as wide in scope as those officials whom he serves and that it is customary for such legal advisers to participate actively in such acts of administration, supervision, and control as are necessary for the proper performance of the duties of the Comptroller and his deputies.

"It is not necessary—in order that acts may be done within the scope of official authority—that they should be prescribed by statute (United States v. Birdsall, 233 U. S. 223, 230-231, 34 S. Ct. 512, 58 L. Ed. 930); or even that they should be specifically directed or requested by a superior officer. Mellon v. Brewer, 57 App. D. C. 126, 129, 18 F. 2d 168, 171, 153 A. L. R. 1519, certiorari denied, 275 U. S. 530, 48 S. Ct. 28, 72 L. Ed. 409. It is sufficient if they are done by an officer '*in relation* to matters committed by law to his control or su-

> pervision.' [Italics supplied.] (Standard Nut Margarine Co. v. Mellon, 63 App. D. C. 339, 341, 72 F. 2d 557, 559, certiorari denied, 293 U. S. 605, 55 S. Ct. 124, 79 L. Ed. 696); or that they have '*more or less connection with the* general matters committed by law to his control or supervision.' [Italics supplied.] (Spalding v. Vilas, 161 U. S. 483, 498, 16 S. Ct. 631, 637, 40 L. Ed. 780; and see Lang v. Wood, 67 App. D. C. 287, 288, 92 F. 2d 211, 212); or that they are governed by a lawful requirement of the department under whose authority the officer is acting."

The liquidation of national banks by the Comptroller of the Currency, directly or through his subordinates, includes the duty of passing upon claims of creditors to be "proved to his satisfaction or adjudicated in a court of competent jurisdiction." Sec. 194, Title 12 U. S. C. (R. S., sec. 5236).

Such liquidation obviously includes decisions as to whether contracts made by the bank before closing shall be carried out, or shall be contested in the courts. If he believes such contracts legal, it is part of the duty of the Comptroller to carry them out. In this case, the pledge contracts existed when the bank was closed and it was the Comptroller's duty, directly or through his subordinates, to decide whether they should be fulfilled or resisted in the courts. *Adams* v. *Nagle,* 303 U. S. 532.

R. S. Sec. 5235 (Sec. 193, Title 12, U. S. C.) directs that the Comptroller shall cause publication of notice for three months "calling on all persons who may have claims against such association to present the same, and to make legal proof thereof".

While it is true that R. S. Sec. 5236 refers in terms only to ratable dividends upon general claims, never-

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theless, R. S. Sec. 5235 contemplates submission to the Comptroller, through the receiver, of proof of *all* claims, whether general claims, preferred claims, secured claims, or otherwise, and the function is necessarily cast upon the Comptroller, through the receiver, to allow or disallow the claims based upon the proof offered, and further, to pay the claims either by pro rata dividends in the case of general claims, or in full in the case of preferred or secured claims. In other words, it would be an idle function to make proof of a preferred or secured claim to the Comptroller, through the receiver, and not pay the same, and of course, the court decisions have established beyond doubt that it is the obligation of the Comptroller to pay preferred or secured claims as well as general claims. *Earle* v. *Pennsylvania,* 178 U. S. 449, 454; *Merrill* v. *National Bank of Jacksonville,* 173 U. S. 131; *White* v. *Knox,* 111 U. S. 784; *Ticonic National Bank* v. *Sprague,* 303 U. S. 406, 411, [1938]

From the foregoing it follows that the allowance of claims, whether general, preferred, or secured, is an act falling within the discretionary authority vested in the Comptroller, and certainly within the general scope of his authority, and further, the payment of said claims is likewise necessarily within the scope of his authority.

The Comptroller is called upon to allow, through the receivers, millions of claims, all over the country in the receivership banks, and thereafter to cause payment of same to be made to the extent admitted by the assets or according to the status of the claim, whether general, preferred or secured.

Certainly it would not be reasonable to say that if the Comptroller, either through mistake of law or mis-

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rum: "Secured creditors have sources of payment for their — the liability of the and the liability of the [illegible] amount good assets to the extent debt is has manifestly [illegible] inequality of the [illegible] between [illegible] and the unsecured [illegible] which cannot [illegible] the the principle of [illegible] distribution.

take of fact, allowed a claim based upon the information and facts before him, and thereafter distributed funds based upon said claim, and subsequently when it developed that the allowance of the claim and the payment thereof was in error, that the Comptroller could be held personally liable. His only obligation would be to endeavor to recover the disbursed funds for the receivership estate. The receiver, by direction of the Comptroller, has brought actions for that purpose.

This situation is clarified by reference to certain deposits of the United States Government, the securing of which by pledges of a bank's assets, is specifically authorized by law. A list of the kinds of deposits so authorized by law to be secured was set out by this Court in *O'Connor* v. *Rhodes*, 79 F. (2d) 146, 150. Such list includes bankruptcy funds, Indian moneys, funds deposited by the Comptroller of the Currency himself, U. S. Postal Savings funds and U. S. Government funds, when deposited in banks by the Secretary of the Treasury.

In each of such classes of deposits, it is obviously a part of the duty of the Comptroller of the Currency and his staff in the first instance to pass upon the question of whether the securing of such deposits is required or authorized by law. If he believes they are required or authorized by law to be secured, it is his duty to permit the sale of the pledged securities without suit by the pledgee. That his decision may be reviewable in the courts just as is his decision as to the allowance or disallowance of unsecured claims of creditors against closed national banks, does not make the decision less a matter within the scope of his jurisdiction.

The actual sale of the pledged securities, made the basis of a separate claim for damages for $1,000,000, is obviously a part of the same transaction. Appellant contends in effect that if the pledged securities had been held longer, they might have been sold at a higher price. This is pure speculation. It furnishes no basis for damages. *Davis Trust Co.* v. *Hardee,* 66 App. D. C. 168, 170; 85 F. (2d) 571, 573. In addition no basis for the conclusion is pleaded, and the sale of the securities was only a part of the carrying out of the pledge agreements made or ratified by appellant himself.

Further, in connection with the question of whether the acts complained of were within or outside the scope of the jurisdiction or authority of appellees, it is significant that nowhere in appellant's complaint and nowhere in appellant's brief is the claim made that the principal acts complained of, namely permitting the carrying out of the bank's pledge agreements, were outside the jurisdiction or authority of appellees.

2. There is no averment in the bill of complaint that the acts complained of were wanton or malicious.

Appellant avoids the issue of whether the acts were within the scope of the officers' authority in his brief by stating the rule of liability of public officers as follows (p. 19):

> "On the question of liability of Government officers, we submit that when acting in good faith within the scope of their authority, public officers are not liable in private actions for damages, but when a public officer goes outside of the scope of his duties *or acts in a wanton, malicious and unlawful manner, he is liable.*" (Emphasis supplied.)

As shown above, appellant nowhere avers that the carrying out of the pledge agreements was outside the scope of appellees' authority.

Appellant, therefore, departs radically from the rule as to the liability of public officers as laid down by this Court in *Cooper* v. *O'Connor*, 99 Fed. (2d) 135, since he depends entirely upon the position that even though the acts complained of are within the scope of the authority of public officers, nevertheless, they are liable in damages if they act in a wanton, malicious and unlawful manner.

There are two answers to this contention, namely (1) There is no averment in the complaint of such acts by appellees; and (2) This is not a correct statement of the law.

As to point (1) mere characterizations, such as "wanton," "malicious," or "fraudulent" are, of course, mere conclusions of law which are not admitted by a motion to dismiss and are to be treated as surplusage unless facts supporting such characterizations are specifically pleaded; and there is no averment in the complaint of any act done by appellees or any of them which could be characterized as "wanton" or "malicious". It has been held many times by this and other courts that making a "mistake of law," which is here averred, is wholly different from acting in an "unlawful manner." Public officials are not liable for mistakes of law when made within the scope of their jurisdiction or authority. This Court so held specifically in *Cooper* v. *O'Connor*, 99 F. (2d) 135, 138.

See also:

> *Standard Nut Margarine Co.* v. *Mellon*, 72 F. (2d) 557, 63 App. D. C. 339; cert. den., 293 U. S. 605;
> *Lang* v. *Wood*, 92 F. (2d) 211, 67 App. D. C. 287.

The principles announced in the cases above relating to liability for mistakes of law made by public officers are followed by the courts in cases involving actual payments of money under a mistake of law. *Lincoln Bus Co.* v. *Jersey Mutual Casualty Insurance Co., et al.* (Court of Chancery of New Jersey, 1932) 162 Atl. 915, 916.

As to point (2) above, appellant does not correctly state the law. ✓

The question was disposed of by this Court in *Cooper* v. *O'Connor,* 99 F. (2d) 135, wherein the same appellant had argued that it was sufficient to state a cause of action if the acts of the public officers were "wanton or malicious." Denying the validity of such argument, this Court said (at p. 140):

> "Appellant next contends that in any event he is entitled to maintain this action if appellees' acts were wanton and malicious. His contention might be correct, other necessary factors being present, if it were applied to one not an official, even though the malicious prosecution complained of had been 'instituted in the appropriate court, and carried on with every formality known to the law.' White v. Nicholls, 3 How. 266, 289, 11 L. Ed. 591. But, although the courts were reluctant to recognize and extend the exception,[11] it is now generally recognized that, as applied to some officers at least, even the absence of probable cause and the presence of malice or other bad motive are not sufficient to impose liability upon such an officer who acts within the general scope of his authority. And the fact that an overzealous or unprincipled officer may get a personal pleasure out of the suffering of a crim-

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[11] Dinsman v. Wilkes, 12 How. 389, 402, 13 L. Ed. 1036: "The rule is not of a character to recommend it to favor; nor to induce a court of justice to extend it beyond the limits to which it has heretofore been confined."

inal is not sufficient to offset the interest of all the people in having the criminal brought to justice. See Spalding v. Vilas, supra, at page 499, 16 S. Ct. 631. Hence, the officer is entitled to the protection which the law throws about him, not because the law is concerned with his personal immunity but because such immunity tends to insure zealous and fearless administration of the law.''

* * * * * *

''But whatever these considerations may indicate as to the wisdom of legislative limitation, the rule as now declared in many cases has been applied, not only to officials judicial and quasi-judicial, but to executive officers generally, such as the Postmaster General,[18] the Secretary,[19] and Assistant Secretary of the Treasury,[20] Members of the United States Parole Board, the Parole Executive, the Warden of a Federal penitentiary, the Director of the Bureau of Prisons,[21] the Commissioners of the District of Columbia,[22] the Chairman of the Tariff Commission,[23] a building inspector,[24] the United States Commissioner of Indian Affairs,[25] and the Chief of Record and Pension Office of the War Department.[26]

''The reason now given for the rule is simply one of public policy. 'Otherwise the perfect freedom which ought to exist in discharge of public duty might be seriously restrained, and often to the detriment of the public service.' De Arnaud v.

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[18] Spalding v. Vilas, 161 U. S. 483, 16 S. Ct. 631, 40 L. Ed. 780.

[19] Mellon v. Brewer, 57 App. D. C. 126, 18 F. 2d 168, 53 A. L. R. 1519, cert. denied, 275 U. S. 530, 48 S. Ct. 28, 72 L. Ed. 409.

[20] Standard Nut Margarine Co. v. Mellon, 63 App. D. C. 339, 72 F. 2d 557, cert. denied, 293 U. S. 605, 55 S. Ct. 124, 79 L. Ed. 696.

[21] Lang v. Wood, 67 App. D. C. 287, 92 F. 2d 211.

[22] Brown v. Rudolph, 58 App. D. C. 116, 25 F. 2d. 540, cert. denied, 277 U. S. 605, 48 S. Ct. 601, 72 L. Ed. 1011.

[23] Smith v. O'Brien, 66 App. D. C. 387, 88 F. 2d 769.

[24] White v. Brinkman, 23 Cal. App. 2d 307, 73 P. 2d 254.

[25] Farr v. Valentine, 38 App. D. C. 413, Ann. Cas. 1913 C, 821.

[26] De Arnaud v. Ainsworth, 24 App. D. C. 167, 5 L. R. A., N. S., 163.

> Ainsworth, 24 App. D. C. 167, 178, 5 L. R. A., N. S., 163. See, also, United States to Use of Parravicino v. Brunswick, 63 App. D. C. 65, 68, 69 F. 2d 383, 386. As was pertinently said in an English case: '* * * Does an action lie against a man for maliciously doing his duty? I am of opinion that it does not; * * *' Dawkins v. Paulet, L. R. 5 Q. B. 94, 114."
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> "Therefore, we conclude that as the acts of appellees were performed in the discharge of their official duties, the motives with which those duties were performed are immaterial, and appellant's contention must fail."

Although, as shown above, the words "wanton" and "malicious," are used in appellant's brief (p. 19), no such characterizations are used in the complaint and although the words "unlawful" and "illegal" and "in fraud of the other depositors and creditors" of the bank are used in the bill of complaint, the use of such words is without effect unless there are averred acts which may properly be so characterized. Thus in *Adams* v. *Nagle*, 303 U. S. 532, the Supreme Court held that the phrase "in fraud of the rights * * * " "falls far short of any charge of actual fraud." To the same effect are *Davis Trust Co.* v. *Hardee*, 66 App. D. C. 168; *Acker* v. *Hamilton*, 66 App. D. C. 171, 85 F. (2d) 574; *Dunn* v. *O'Connor*, 67 App. D. C. 76, 89 F. (2d) 820, 827; *O'Connor* v. *Watson*, C. C. A. (5th) 81 F. (2d) 833, 836; *Meeker* v. *Baxter*, C. C. A. (2d) 83 F. (2d) 183, 186.

It must be concluded, therefore, first, that no facts are averred in the complaint which would justify the characterization of the acts complained of as "wanton," "malicious," or "unlawful," and in addition, as stated by this Court in the previous case of *Cooper* v. *O'Con-*

nor, 99 F. (2d) 135, the acts complained of being within the jurisdiction of the appellees, the motives of appellees are immaterial.

3. No facts even indicating fraud are averred in the bill of complaint.

As stated previously, the position of appellant apparently is that the acts themselves were in effect fraudulent, but what has been stated above with respect to the use of the words "wanton," and "malicious" applies with equal force with respect to the averment of "fraud."

In paragraph numbered 7 of the bill of complaint (R. 5), it is averred that appellees O'Connor and Barse entered into a scheme or plan by which the said suit (*O'Connor* v. *Rhodes, supra*) of said Rhodes would be merged or consolidated with the suit instituted by the said J. F. T. O'Connor, or his duly authorized agent, Robert C. Baldwin, Receiver of the said Commercial National Bank of Washington, D. C., for the recovery of said monies, the said Thomas E. Rhodes or his attorneys to be paid the sum of $12,000 of the depositors' money.

It is the payment of such $12,000 to Rhodes' attorneys that is then averred to be "fraudulent." The basis of this averment is shown in the records of the United States Supreme Court and of this Court and of the trial court in the case of *O'Connor, et al.* v. *Rhodes, supra,* and *Inland Waterways, et al.,* v. *Hardee, supra.* Since appellant has specifically referred to such cases in the bill of complaint, it is obviously appropriate for the Court to take judicial notice of the facts.

Summarized, the sequence of events follows:

Rhodes, having begun his suit to return the preferential payments from the governmental agencies to the depositors, the Comptroller and the Receiver believed that the Receiver alone had the right to bring such suit and hence contested the Rhodes suit upon that ground. The United States Shipping Board Merchant Fleet Corporation and other defendants in the Rhodes suit contested it upon its merits. This Court, having decided in *O'Connor* v. *Rhodes, supra,* that Rhodes had the right to pursue his suit, and the Receiver under the instructions of appellee O'Connor having begun the suit of *Inland Waterways Corp., et al.,* v. *Hardee, supra,* to recapture the preferential payments from the governmental agencies, a motion for reargument in *O'Connor* v. *Rhodes* was filed in this Court, and in its *per curiam* opinion thereon, 79 F. (2d) 146, this Court denied the motion for modification of opinion and judgment, but discussed the procedure of having the Rhodes case stayed while the case brought by the Receiver proceeded and added the following statement (at p. 153):

> "But we say this without prejudice to the right of the trial court, on motion and under the exercise of its judicial discretion, and on such reasonable terms as it may impose, to arrange the order of trial in the two suits as may result in the most economical and speedy determination of the issues involved."

The Supreme Court granted *certiorari* on the sole point of whether the Rhodes case should proceed and in a *per curiam* opinion in *United States Shipping Board Merchant Fleet Corporation* v. *Rhodes,* 297 U. S. 383, said (at page 387):

> "As the case turns on its exceptional facts and suit has been brought by the receiver, and the course of procedure in the interest of economical and efficient administration is left to be determined

> by the trial court in the exercise of a sound discretion, the decree of the Court of Appeals is affirmed.''

Thereupon, there was filed in the Rhodes case in the trial court (R. 25) a consent order signed by the Trial Judge providing that the Rhodes case should be stayed, that the suit brought by Receiver Baldwin should proceed, and that Rhodes for the services rendered by his attorneys should be paid the sum of $12,000.

Instead, therefore, of the action of staying the Rhodes suit and the payment to him for his attorneys of the sum of $12,000, being a fraudulent ''scheme or plan'' on the part of appellees, such procedure clearly was in the interest of the expeditious handling of the litigation, was approved by the depositor Rhodes, who had sued for the other depositors, and was approved by the trial court in compliance with the decision of this court and the Supreme Court that the Rhodes case might be stayed on ''such reasonable terms as it (the trial court) may impose.''

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4. The appellant has no standing in Court.

a. *As an officer of the bank, appellant made or ratified the illegal pledges.*

Appellant has himself called attention in his brief (p. 17) to the fact that he was president of the Commercial National Bank at closing and since the record shows (R. 4) that all of the pledges of the bank's assets now characterized by appellant as ''illegal,'' and ''unlawful'' were made prior to the closing of the bank, the appellant, having participated in and assented to the original unlawful pledges cannot recover the proceeds of such pledges in the form of damages from appellees.

b. *Appellant is guilty of laches.*

As shown previously, all of the transactions complained of took place early in 1933, except the payment of the $12,000 to Rhodes for his attorneys, which as shown by the record (R. 25) took place in May, 1936. The bill of complaint herein (R. 2) was filed February 7, 1938. The opinion of this Court in *O'Connor* v. *Rhodes, supra,* at (p. 147) showed that Rhodes brought his suit in the summer of 1934, and such suit was argued in this Court in May, 1935, and decided in June, 1935. It is obvious, therefore, that appellant did not file his suit until more than four years after the acts complained of (except the payment of the $12,000) took place and nearly two years after the payment of the $12,000. The mere averment in the bill that appellees were trustees does not change the rule of law involved and in this situation, the rule of law in this jurisdiction and elsewhere is that the statute of limitations will be applied by analogy.

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CASES IN EQUITY

Sis v. *Boarman,* 11 App. D. C. 116,
Columbian University v. *Taylor,* 25 App. D. C. 124,
Washington Loan and Trust Co. v. *Darling,* 21 App. D. C. 132,
Alexander v. *Fidelty Trust Co.,* 214 Fed. 495, D.C. PA
In re Conn. Brass & Manufacturing Co., 257 Fed. 445. [D.C. CONN [illegible]]

DICTUM: DISMISSAL OF BKPTCY SUIT FOR FAILURE OF CREDITOR TR. TO PROSECUTE.

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c. *If any right of action exists, it is vested in the depositors and creditors of the bank, not in a stockholder.*

Stockholders in a closed bank have no rights with respect to the assets of such bank, or claims by it against others, until the depositors and other creditors have been paid in full with interest.

Richmond v. *Irons*, 121 U. S. 27,
United States Savings Bank v. *Morgenthau*, 85 F. (2d) 811, 815; 66 App. D. C. 234.

Appellant has sued only as a stockholder and while he avers that he sues on behalf of depositors and creditors and stockholders, he shows no right so to do. He makes no averment showing any possibility of the stockholders of the Commercial National Bank of Washington having any interest in the proceedings since he nowhere avers any facts showing that depositors and other creditors will be paid in full nor does he aver any facts which might impliedly lead to that conclusion.

CONCLUSION.

In view of the foregoing, it is respectfully submitted that the action of the court below in dismissing the bill of complaint should be affirmed.

Respectfully submitted,

Brice Clagett,
Charles E. Wainwright,
George B. Springston,
Attorneys for Appellees.

[illegible] statement:

"It is plain however that no part of
assets of the Bank may be turned over by, th
receiver to the stockholders until after both the pr
of its debts and the interest thereon are fully pa
(In answer to π's contention that bank was solvent as to princip

→ SEE ALSO

Davis Trust Co. v. Hardee

App. D.C.,

85 F (2) 571, 574 [1936]